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ADDRESS DELIVERED BY JUSTICE JESSE W. CARTER
OF THE SUPREME COURT OF CALIFORNIA
BEFORE A MEETING OF CALIFORNIA JURY COMMISSIONERS ASSOCIATION
AT RICKEY'S EL RANCHO MOTEL, IGNACIO, CALIFORNIA,
ON MAY 1ST, 1958, ENTITLED
"THE AMERICAN JURY SYSTEM"

* * *

Ladies and Gentlemen:

It has been said that in the evolution of the common law no single factor has had a greater impact on the administration of justice than the jury system. It has been referred to as "our English heritage."

In his first inaugural address on March 4th, 1801, President Thomas Jefferson stated that he deemed the most essential principles of our government to be: "equal and exact justice to all men, of whatever state or persuasion, religious or political; freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected -- these

principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation."

In England before trial by jury became accepted, there were three ways of proving your case:

Trial by ordeal which meant that if one were accused of a crime and pleaded innocent, his hand might be put in boiling water, then wrapped up. If it was "clean," or uninfected, in three days, it showed he was not lying, otherwise he was guilty.

Trial by battle if the case involved a civil matter. This method still seems to exist in Marin County.

(3) A third method was known as "oath-helpers." These were friends of a party who had to recite an oath without making an error. If there was a mistake, it was divinely inspired to prove the particular oath-helper was helping the party who was wrong.

After the Norman conquest in 1066, the kings of England organized a strong centralized government. To them, they sent out officers to collect information from each district of the country. These were empowered to select groups of local citizens who were put on oath and made to give information about the locality. These questions could be about the ownership of land, local customs, or who was guilty of a particular crime. The local groups testified from their personal knowledge. When Henry II sent out first Justices, or circuit-riding judges, in the twelfth century, they employed these same groups to discover facts in the cases before them. They merely gave information and made no decisions.

All of the above practices were in use three hundred years before in France. It is the theory of some historians that they were brought to England by the Normans. These practices disappeared in France about the time they appeared in England. It is strange that the institution

which is the pride of Anglo-American law and the traditional guardian of our liberties, is of royal origin, but not popular with royalty and was borrowed from the French by the conquerors of England.

It soon came to be used by the church and by local lords as a means of control over the districts under their jurisdiction. A group of knights were sworn to give information about their neighbors. They testified as to facts of importance in their neighborhoods from their own knowledge.

Eventually it became the right of parties to a law case to place themselves "on the country," that is, instead of proving their case by the old methods of trial by battle, for example, they would permit representatives of the neighborhood, or "country" to decide the case for them. The term "on the country" means that the twelve persons appointed to decide the case represented the "country," not merely themselves as individuals. Since the country could give only one decision, it was thought that the decision of the twelve

persons must be unanimous to be truly representative. Oddly although our modern civilization and the legal and practical problems it presents, bears little resemblance to medieval England, it is still part of our notion of a proper jury trial that the jury itself must truly be representative of the country in which the case is tried. In fact, the problem of representation is one of the great current problems facing us today in the matter of selecting a jury. In the early days of the jury trial, when the jury first decided the case and did not merely give information about it, the jurors were selected and could be approached individually at any time before they made their decision. It was some years before the giving of evidence was limited to the courtroom.

Some idea of the right to trial by jury for criminal offenses was reflected in the Magna Charta, the first written monument to the Anglo-American system of legally enforced freedom. Section 39 provides: "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any

ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

Judgment by peers of the accused was aimed to protect him from prejudice. An accused could object to the presence of anyone of a rank beneath him sitting in judgment upon him. This guarantee of protection against prejudice has become a traditional requirement in the selection of a jury.

From this time on, English law progressed until in the reign of Edward I, the law was divided into two branches, "law" and "equity." We still have these two branches today, although the ordinary person does not realize it, and little, if any distinction between the two is made by our judges. These two systems continued down through the reign of many kings until Lord Coke, under Queen Elizabeth, after a controversy with Lord Ellesmere, made law the more important of the two systems. This incidentally, was the system that

dealt with trial by jury, and came to be called the "common law." The English common law progressed, and when the English began to colonize in America, they had a well-established court system. This was brought to America along with the English language, government, and other customs, and by the time of the American Revolution, we too had a working court system. The founding fathers must have firmly believed in the right of trial by jury as they provided in the Constitution of the United States that: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ." (Art. III, section 2, clause 2, Constitution of the United States.) And the Seventh Amendment to the Constitution of the United States declares: "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Note the words, "common law" and the power given to the jury to determine facts under the Constitution.

While the states are not required by any provision of the Constitution of the United States or its amendments to provide for a jury trial in any case, it has been held that under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a state must provide

a "fair trial," and where trial is by jury, it must be by an impartial jury. However, the Constitution of California expressly declares: "The right of trial by jury shall be secured to all, and remain inviolate." (California Constitution, Article I, section 7.) Although our Constitution contains no provision relative to the selection of juries, it has been held that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires an impartial selection of a jury list. This problem has been one of great concern for many years. Our statutes

clear and specific. Section 205 of the Code of Civil Procedure provides: "The selections and listings shall be made of persons suitable and competent to serve as jurors,

and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment."

With this statute as his rule and guide, all the Jury Commissioner has to do is to find enough people in his county who can and are willing to qualify as jurors during each and every year. I am thoroughly aware of the that this is no easy task.

In view of all of the exemptions permitted by statute and the rule against the exclusion of any one on account of race, color, creed, sex, political or religious convictions or geographical area groups, a successful commissioner must be a combination of sociologist, psychologist, personnel director and a good all-round politician

I am sure our most excellent host here today is eminently qualified to fill the position of Jury Commissioner

of Marin County. At least I have never heard any criticism of his method of jury selection.

A few years ago there was considerable criticism of the method of jury selection in San Francisco, both in the state and federal courts. In reversing one case appealed from the United States District Court in San Francisco, the Supreme Court of the United States declared:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [Citations.] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. To disregard it is to open the door to class

distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (Thiel v. Southern Pacific Co., 328 U.S. 217, 220.)

It was also held (pages 223 and 224) that "[T]he general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid \$3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do. Jury

service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear."

The law now appears to be well settled that any intentional and systematic exclusion of certain classes of people who are otherwise qualified to serve on a regular panel, violates constitutional guarantees of impartial jury selection, and when a claim of prejudice is made by a member of an excluded class, it will be considered meritorious by most courts.

The right to a trial by jury is guaranteed to every citizen of California by our Constitution and the composition of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is,

of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

Blackstone, in his Commentaries, says: "The right of trial

jury, of the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what some people call "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of that statute must have known full well

existence of such prejudice and its likelihood to exist against certain persons and certain types of cases

Speaking of prejudice against a group as affecting impartiality of a juror, I recall an incident related by

my father who was on a jury panel in a murder case tried in Trinity County back in the '80's. A white man was on trial

the murder of a Chinese. The Chinese were very unpopular in Trinity County during that period because they had been brought in there in great numbers to work as laborers and the natives felt that the Chinese were taking work away from them and that one less Chinaman was "good riddance." It appeared that most of the testimony for the prosecution would come from witnesses who were Chinese. During his voir dire examination,

district attorney asked my father whether he would place as much credence in the testimony of a Chinese as he would in

testimony of a white man. His answer was, "Show me your white man."

Since I learned at an early age that race or color has nothing to do with integrity, I have no sympathy with those who classify people on that basis.

Many people criticize our jury system and it has its imperfections. It may be truly said, however, that it has

proved to be the most satisfactory method of determining issues of fact in both civil and criminal cases.

It is true that both judges and juries will sometimes make mistakes. Otherwise they would not be human. But, because juries sometimes err in deciding questions of fact, there is no more reason to give judges power to set aside their verdicts, in the absence of legal error, than there would be reason to give juries power to set aside the decisions of judges merely because judges may sometimes err in deciding questions of law in ways for which there may otherwise be no redress.

The only possible basis for reaching any other conclusion is to contend that juries, being human, are subject to passion and prejudice and that judges are better qualified than juries to decide questions of fact. Indeed, this seems to be the basic assumption underlying the arguments of those opposed to the jury system.

At the outset of any discussion of this subject, it should be frankly recognized that, like politics and religion,

this is a subject on which honest men disagree. It is entirely natural that many honest and conscientious judges, in their zeal for improvement in the administration of justice, feel that they should have power to set aside verdicts which, in their opinion, are "unreasonable" or "unjust," whether involving a verdict claimed to be "excessive," a verdict claimed to be "inadequate," or a verdict in some other type of case.

It would appear that the underlying basis for this position is a feeling by these judges that they are better qualified than juries to decide questions of fact and, to be more specific, a feeling, held consciously or unconsciously, that juries are less intelligent and experienced than judges in such matters and are subject to passion and prejudice, while judges are above such human frailties

Judges will not presume to set aside or refuse to enforce decisions, rules, and regulations of administrative agencies, ordinances or statutes adopted by city councils or

state legislatures, or contracts between individuals simply because the judges may feel, sometimes with good cause, that they are "unjust" or "unreasonable," in the absence of some legal basis other than the mere fact that the judge's sense of "reason" and "justice" is offended.

There are, of course, legal distinctions to be drawn between these examples and the verdicts of juries. The comparison does, however, serve to point up the significance the sweeping nature of the power claimed by many judges when they demand the right to set aside the verdict of a jury, which likewise is a body chosen as representative of the people, simply because the individual judge is of the opinion the verdict is "unreasonable" or "unjust."

But even the judges themselves are far from unanimous on this subject. It is thus of interest to quote statements of other judges representing a wholly different viewpoint as well some statements by lawyers and law professors on this subject.

The Supreme Court of the United States, in *Sioux City & Pacific R. R. v. Stout*, stated:

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

As stated by Judge Crane, of the New York Court of Appeals:

"There is no better or healthier system I know of than to have disputed questions of fact, both in civil and

criminal cases, passed upon by ordinary citizens of ordinary intelligence. These men who compose the jury are much more apt to be conversant with affairs and with the burdens, responsibilities and hardships of daily life than a secluded and exclusive judiciary."

Similarly, it was held by Judge Brawley, in Travelers' Insurance Co. v. Selden, that: "the judgment of twelve impartial men, of the average of the community, applying their separate experiences of life to the solution of such doubts as may arise, is more likely to be wise and safe than the conclusion of any single judge, and the practice is not to be encouraged which would substitute the conclusions of one mind for that average judgment which is the object of our system of jurisprudence to obtain in all proper cases."

But judges and jurors sometimes think alike. This fact is demonstrated by the following excerpt from a record in a personal injury case tried in Los Angeles County.

"MR. WORTHINGTON (attorney for plaintiff): Doctor, in language as nearly popular as the subject will permit,

will you please tell the jury just what the cause of this man's death was?

"WITNESS: Do you mean the proxima causa mortis?

"MR. WORTHINGTON: I don't know, Doctor. I will have to leave that to you.

"WITNESS: Well, in plain language, he died of an edema of the brain that followed a cerebral thrombosis, or possible embolism, that followed, in turn, an arteriosclerosis combined with the effect of gangrenous cholecystitis.

"A JUROR: Well, I'll be God damned.

"THE JUDGE: Ordinarily I would fine a juror for saying anything like that in court, but I cannot in this instance justly impose a penalty upon you, sir, because the court was thinking the same thing."

In my twenty-six years of law practice I tried many jury cases. I developed what I choose to call a practical jury psychology. There was nothing magic about it. In fact was very simple. By a few direct questions and some not

quite so direct, I sought to elicit answers from the prospective juror as to his state of mind toward my client and his case. While this process did not always satisfy me beyond doubt as to his state of mind, I was able to form an opinion as to whether he would be fair and impartial, and this was all I had a right to expect. I enjoyed trying cases, and with very few exceptions, I found that juries reached results which harmonized with my concept of justice and right.

While our judicial system has its imperfections, I have heard of no substitute which may be fashioned to accomplish its objective -- "equal justice under law." what is justice? The best definition I have found is: "To render to every man his due." To accomplish this our systems of law and equity have been devised. These systems have established rules to guide judges and juries in determining the rights of those who may seek redress for wrongs inflicted upon them. If these rules are followed, a litigant is

accorded "due process of law" and it may then be said that justice has been administered in accordance with law. It is when these rules are not followed that we have such shocking episodes as the recent kidnapping of a Finnish immigrant by immigration officials and the ruthless invasion and destruction of private property by the officials of Marin County. Such travesties as these are the product of an abuse of power by public officials who are not a part of our judicial system and evidently feel like Boss Hague that "They are the law," or to use the language of the street, "drunk with power."

The great philosopher Macaulay once said: "The highest form of virtue is to possess boundless power without abusing it." In my opinion the abuse of power is the most obnoxious thing in the world today. It has been truly said that "power is a bell which prevents those who set it pealing from hearing any other sound."

History is replete with examples of those in high places who have usurped and abused power -- Caesar, Nero,

Napoleon, Hitler and Mussolini are a few of the most notorious, and who all came to the same tragic end

We Americans probably owe our independence to the abuses inflicted upon our forefathers by King George III of England. These abuses were the result of unrestrained power which caused the embattled farmers on the bridge at Lexington to "fire the shot heard 'round the world."

Today many people submit to abuses of official power because it is too expensive to resist it, or because they do not want the notoriety which would result from their resistance. They thus forfeit rights guaranteed to them by our fundamental law which any court of justice would secure and protect.

If we are to perpetuate our American way of life with its ideals of life, liberty and the pursuit of happiness, we must look to our courts for protection against the abuses of power practiced by administrative agencies and officials to the end that these abuses may be stopped and that the

rights guaranteed to every citizen that he may not be deprived of his life, liberty or property without due process of law will amount to something more than mere rhetoric and will in truth and in fact become a living reality.